Supreme Court, U.S.
FILED
OCT 7 1980
MICHAEL RODAK, JR., CLERK

Docket Number 80-313

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

- -X

CHARLES SUTTON, :

Appellant, :

v. :

JOINT BAR ASSOCIATION GRIEVANCE :
COMMITTEE FOR THE SECOND AND
ELEVENTH JUDICIAL DISTRICTS, :

Appellee. :

:

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK AND :

ON APPEAL FROM THE APPELLATE DIVISION, :
SECOND DEPARTMENT OF THE SUPREME COURT
OF THE STATE OF NEW YORK :

- -X

APPELLANT'S OPPOSITION
TO MOTION TO DISMISS

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Dated: October 6, 1980

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Statement

This appeal presents five substantial federal questions, each of which would justify plenary consideration by this Court, to wit: (1) the invalidity of Rule 691.4 as applied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (2) the invalidity of Rule 691.4(e)(5) on its face and as applied, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the impermissibility under the Due Process Clause of the Fourteenth Amendment of the use of the lowest civil monetary issue private action standard of proof of preponderance of the evidence to try and convict appellant in the public, highly penal, quasi-criminal attorney disciplinary proceedings involving and threatening the loss of appellant's most fundamental constitutional interests at stake of "liberty" and "property"; (4) the invalidity under the Due Process Clause of the Fourteenth Amendment of

the conviction of the appellant upon a charge not made and not tried in violation of the Due Process Clause of the Fourteenth Amendment; and (5) the conviction of appellant of professional misconduct without evidence and upon insufficient evidence in violation of the Due Process Clause of the Fourteenth Amendment.

Page restrictions require that this response be limited to the first four issues and reference in all respects is made to the appellant's Jurisdictional Statement.

Point I. Rule 691.4 is a statute under 28 U.S.C. Section 1257(2) and this appeal as of right is properly before this Court.

Appellee argues at Motion at pp. 14,17 that 28 U.S.C. Section 1257(2) is not applicable because it is not a statute. A rule of court is a "statute" within the meaning of 28 U.S.C. Section 1257(2). In re Griffiths, 413 U.S. 717 (1973); Mayer v. City of Chicago, 404 U.S. 189 (1971); Marcus v. Search Warrant, 367 U.S. 717 (1961); Williams v. Bruffy, 96 U.S. 176 (1877); Stern & Gressman, Supreme Court Practice, p.162 (5th Ed. 1978).

Point II.	Rule 691.4 is unconstitutional as applied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
Point IIA.	Rule 691.4(e)(5) is unconstitutional on its face and as applied in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The appellee's motion to dismiss this appeal summarily cannot be justified in the light of the appellee's own construction and explanation of Rule 691.4(e)(5), set forth at Motion, pp. 13-14, to wit:

> "The prompt action provisions under section 691.4(e)(5)(supra) serves the purpose of avoiding additional delay in the conduct of the disciplinary proceeding where the public interest demands that expeditiousness is required and probable cause exists, such as where there is an allegation that escrow funds have been converted. Therefore, in those instances one hearing is conducted before a referee rather than holding an additional investigatory subcommittee hearing before the Joint Bar Association Grievance Committee",

which demonstrates the unconstitutionality of Rule 691.4(e)(5) on its face and as

applied in violation of the Due Process and Equal Protection Clauses of the 14th Amendment. Appellee shows that the grant or denial by appellee of notice and opportunity to be heard to appellant, or to any attorney, depends on no statutory standard and no standard at all, but on what the appellee may subjectively and arbitrarily decide, on an ad hoc basis, whether the "public interest" demands "expeditiousness" and depends on the appellee's arbitrary and subjective view of the allegations of the charges. By appellee's own explanation, Rule 691.4(e)(5) is applied unequally and with a special animus against attorneys arbitrarily selected by the appellee and does not apply and is not construed by appellee to apply equally, impartially, and even-handedly to all attorneys subjected to charges, in violation of the Equal Protection Clause of the 14th Amendment. F.S. Royster Guano Co. v. Vir-

ginia, 253 U.S. 412, 415 (1920); Yick Wo v. Hopkins, 118 U.S. 356 (1886); N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 587-588, 592 (1979) and Ibid., at 609, (White, J.) (Dissent); San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 89(1973) (Marshall, J., dissenting).

There would be no question whatever of the invalidity of a criminal statute which allowed a prosecutor or any governmental authority to decide to deny an accused any of the substantive and procedural rights due to every other person accused of crime, that is, "less substantive and procedural protection", simply because of the allegations made, or the nature of the crime charged, Jackson v. Indiana, 406 U.S. 715, 723-724 (1972); Vitek v. Jones, ___U.S. ____, 63 L.Ed. 2d 552, 100 S. Ct.1254(1980), or whether "public interest" demanded "prompt action"; Shelton v. Tucker, 364 U.S. 479, 488 (1960); Jackson v. Indiana, supra; Vitek v. Jones, supra; Kennedy v. Mendoza-Martinez, 372 U.S.144,165 (1963).

The constitutionality of Rule 691.4 and Rule 691.4(e)(5) is subject to the standard of strict judicial review since

the appellant's interests which are impinged upon are his fundamental constitutional rights of "liberty" and "property" (J.S. 25-27). Dunn v. Blumstein, 405 U.S. 330, 336-338 (1972). As shown in the Jurisdictional Statement, pp. 28-29, the appellee was created for the very purpose to conduct the first stage proceedings in accordance to Rule 691.4(e)(1-4),(f),(g), and (h), and so appellee has no interest to deny appellant those statutory rights.

Appellee's argument at Motion pp. 13-15 is frivolous not only because the Grievance Committee of the Brooklyn Bar Association is an entirely different body from the appellee, Shaw v. The Hospital Authority of Cobb County, 507 F. 2d 625, 628 (5th Cir. 1975), and was held more than 4 years before the existence of these charges, and at least one year prior to the existence of the appellee, but also because the com-

plaint by the Santoras in December, 1972 ... to the Brooklyn Bar Association, was a request for 'help to get back' the contract down payment forfeited by them by their breach of contract and did not make any of the charges alleged in this case. Further there was never any hearing of any kind by any body as to Zolondek and De Loach.

As clearly shown at J.S. 24, 25, 28-29, 34, and from the face of Rule 691.4 and in particular Rule 691.4(e)(1-4), (f), (g) and (h), the appellee is an accusatory, prosecutorial and adjudicatory quasi-judicial body exercising a judicial function.

Appellee's motion to dismiss cannot be justified also in the light that the decision below is in conflict with the decisions of this Court that

> "'Wherever one is assailed in his person or property there he may defend'. Windsor v. McVeigh, 93 U.S. 274, 277, 23 L.Ed. 914 (1896). See, Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531 (1864); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L. Ed. 215 (1897)," Boddie v. Connecti-

cut, 401 U.S. 371, 377 (1971), and cases cited at J.S. 25,

and that the right to notice and opportunity to be heard "before he is deprived of a significant property interest" is a "root requirement" of due process, Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971), that this right is as fundamental a constitutional right as the constitutional right to religious freedom, free speech or assembly, Boddie v. Connecticut, 401 U.S. 371, 379-380 (1971), that these principles have "remained relatively immutable in our jurisdiction", Greene v. McElroy, 360 U.S. 474, 496-497 (1969), and that secret, ex parte proceedings involving "secret, one-sided determination of facts decisive of rights" are constitutionally impermissible, Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170-171 (1951)(Frankfurter, J., concurring),and in the light of the square conflict of the decision below with the decisions of this

Court that the rule

> "should be interpreted...so as to observe due process in its basic meaning". Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 165 (1951)(Frankfurter, J., concurring); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1926); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-106 (1963); Gonzales v. United States, 348 U.S. 407, 410-412 (1955); Morgan v. United States, 304 U.S. 1, 19 (1938);

and in the light of the square conflict of the decision below with the decisions of this Court requiring that an agency must obey its own rules, United States v. Nixon, 418 U.S. 683, 694-696 (1974); Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954), and cases cited in J.S. 32-33,

and in the light of the conflict of the decision below with the decisions of this Court requiring notice and opportunity to be heard to be accorded at both the first stage and the second stage of a proceeding, Ward v. Monroville, 409 U.S. 57, 61-62 (1973), and cases cited at J. S. 32-33.

Point III. It is unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amentment to try and to convict an attorney of misconduct and punish him by suspension on a standard of proof of "fair preponderance of the evidence."

The issue of the constitutional impermissibility of the use of the preponderance of the evidence standard of proof in this attorney disciplinary proceeding is a substantial federal question in the light that this Court has twice this Term granted plenary review in cases involving the issue of the constitutional impermissibility of the use of the preponderance of evidence standard of proof, to wit: certiorari granted April 28, 1980 to the United States Court of Appeals for the Fifth Circuit in Steadman v. S.E.C., docket number 79-1266 and probable jurisdiction noted on appeal from the Delaware Supreme Court in Doe v. Delaware, docket number 79-5932(J.S. 43), and in the light that in two cases in the immediate past, this Court has granted plenary

review and has decided this issue as a constitutional due process issue, to wit, Addington v. Texas, 441 U.S. 418 (1979) and Vance v. Terrazas, 444 U.S. 252, 100 S.Ct. 540 (1980), and in other cases in different contexts, to wit, In re Winship, 397 U.S.358 (1970), involving civil labelled juvenile proceedings; Mullaney v. Wilbur, 421 U.S. 684 (1975), involving a criminal case as to permissible standard of proof upon defendant to establish an affirmative defense; and the cases cited by this Court in Addington v. Texas, supra, 99 S. Ct. at 1812, namely, Woodby v. INS, 385 U.S. 276 (1967), involving deportation; and Schneiderman v.United States, 320 U.S. 118, 125 (1943), involving denaturalization, and Chaunt v. United States, 364 U.S. 350 (1960) involving denaturalization, Rosenbloom v. Metromedia, 403 U.S. 29 (1971) and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), both involving libel, and The Barbed Wire Patent Case, 143 U.S. 275, 284 (1892), involving a patent (also, J.S. 41-53), and in the

light that the issue of standard of proof in this attorney disciplinary proceeding is in conflict with the statements and apparent holding of this Court on this issue in Ex Parte Wall, 107 U.S. 265, 288 (1882), for the Court, and by Mr. Justice Fields in dissent, 107 U.S. at 275, 318 (J.S. 50), in the light that this issue has produced a conflict among the states in that the majority of the state courts, namely 34 states out of a total of 44 states, require a standard of proof higher than preponderance of evidence, and generally "clear and convincing evidence" (J.S. 50-53), which are listed and described in the Appendix to appellant's Jurisdictional Statement at pp. 85a-97a, that at least two states, Georgia and Kentucky, require proof "beyond a reasonable doubt", and in the light that the decision of the New York courts in this case is also in direct conflict with on this issue with all of the federal courts reporting on this issue, namely, the United States Courts of

Appeal for the Fourth, Seventh, Eighth, and District of Columbia Circuits, and the United States District Court for the Southern District of New York (J.S. Appendix 85a-97a), holding that the standard of proof must be at least "clear and convincing", in the light that New York (and many other courts) holds that an attorney disciplinary proceeding is a "civil" proceeding, (See, Appellee's Motion, 15), which holding is in direct conflict with the ruling of this Court in Matter of Ruffalo, 390 U.S. 544, 550-551 (1968) that this proceeding is a penal, quasi-criminal adversary proceeding, indicating thereby the requirement for a higher degree of due process than in a civil case (See, J.S. 49-50), and in the light that almost all, if not all, of the fifty states and the District of Columbia, and the federal courts, have adopted either verbatim or in substance the American Bar Association Code of Professional Responsibility, (the penal code for lawyers), J.S.

Appendix 74a-84a, 7 Martindale-Hubbell Law Directory, 1M-2M (1980 ed.), New York Law Journal, September 10, 1980, pg. 1, cols. 3-4, pg. 6, cols. 1-3, and in the light that since the ABA Code of Professional Responsibility is, to all intents and purposes, uniform throughout the United States, it is only fair and proper that the standard of proof by which an attorney is tried and acquitted or convicted, should also be uniform, and in the light that the standard of proof is an essential component of fair trial, as much as the burden of proof is, see, People v. Patterson, 39 N.Y. 2d 288, 292-302, aff'd. sub nom Patterson v. New York, 432 U.S. 197 (1977), (J.S. 49), and directly affects the truth finding function of the trier of fact, In re Winship, 397 U.S. 358, 370 (1970)(Harlan,J.,concurring); Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 1808 (1979), and directly affects the feeling of appellant and all other lawyers that justice has not been done, Joint Anti-

Fascist Comm. v. McGrath, 341 U.S. 123, 170-173 (1951) (Frankfurter, J., concurring), particularly in the face of the fact that in the State of New York, on a charge of a mere traffic violation, not involving any risk of a jail term, the standard of proof is "beyond a reasonable doubt" in areas outside of the City of New York, and is "clear and convincing evidence", within cities having a population of over one million, Rosenthal v. Hartnett, 36 N.Y. 2d 269 (1975), which was decided as a federal constitutional matter under the Due Process Clause of the 14th Amendment, (J.S. 43-44), and in the light that issues of fraud and misrepresentation were decided in this case, issues as to which the settled law of the State of New York is that the standard of proof in civil case involving fraud that the standard of proof is not less than "clear and convincing" evidence, Simcuski v. Saeli, 44 N.Y. 2d 442, 452-453 (1978) as well as in every other jurisdiction (J.S. 46-47), so that

appellant was also denied Equal Protection under the Fourteenth Amendment by the use in this case of the lowest civil standard of proof of preponderance of evidence. This case is as deserving of plenary review as the similar issue was in Steadman v. SEC, docket number 79-1266, a case which affects a non-professional group, whereas the issue in this case affects every attorney across the nation, and will have an equal effect on other professions by extension. The issue presented is a weighty constitutional issue that deserves plenary review by this Court at this time. At the least, this Court might hold this case pending decision in Steadman v. SEC, docket no.79-1266.

Point IV. Conviction on a charge not made and not tried denied appellant due process under the 14th Amendment.

Appellee at Motion pp. 15-16 shows its admission that "misrepresentation" in Zolondek was not charged against appellant. Conviction on a charge not made denied ap-

pellant due process under the 14th Amendment and presents a substantial federal question. Matter of Ruffalo, 390 U.S. 544, 550-552 (1968); Cole v. Arkansas, 333 U.S. 196, 201-202 (1948); De Jonge v. Oregon, 299 U.S. 353, 363 (1961).

Conclusion

For the reasons stated in this opposition and in the Jurisdictional Statement, this appeal should not be decided summarily but should be set for plenary hearing.

Respectfully submitted,

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Dated: October 6, 1980